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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1179

FRANK PETER BALISTRIERI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on October 2, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 606 F.2d 216 (7th Cir. 1979), and a copy of said opinion is attached hereto as Appendix A. The interlocutory order of the United States District Court for the Southern District of Illinois entered December 3, 1976, is

reported at 423 F. Supp. 793 (S.D. Ill. 1976), and is attached hereto as Appendix C. The interlocutory order of the district court entered September 14, 1977, is unreported, and is attached hereto as Appendix D. The final order of the district court entered Novmeber 10, 1978, is unreported, and is attached hereto as Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 2, 1979 (Appendix A). A timely petition for rehearing was denied on December 6, 1979 (Appendix B). On December 26, 1979, Mr. Justice Stevens extended the time for filing the Petition for a Writ of Certiorari until February 4, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether due process and the assurance of careful consideration and plenary processing of a claim require that a petitioner seeking postconviction relief should be afforded discovery before the district court summarily dismisses his claim, where the record before the court shows government concealment of extensive unlawful electronic surveillance during which he has been overheard on four occasions, one of which is a conversation with his attorney.

2. On a motion in the nature of a writ of error *coram nobis* to vacate a judgment of conviction in a criminal case, should the district court apply the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure, or both sets of rules, and do the Rules Governing Section 2255 Proceedings for the United States District Courts have any applicability to such a proceeding?

3. Should a petitioner be granted postconviction relief and have his conviction set aside, because of the government's

nefarious conduct in concealing from the courts and him an unlawful electronic intrusion into his attorney-client relationship, as well as other overhearings of him, particularly since a vast amount of other unlawful electronic surveillances on him previously had been concealed by the government?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

U.S. Const., amend. V.

The sixth amendment to the United States Constitution provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to . . . the assistance of counsel for his defense.

U.S. Const., amend. VI.

28 U.S.C. § 1651(a) provides as follows:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a) (1970).

Federal Rule of Civil Procedure 26 provides in pertinent part as follows:

Rule 26. **General Provisions Governing Discovery**

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

. . . .

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; . . .

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. . . .

Fed. R. Civ. P. 26(a), (b), (c).

Federal Rule of Civil Procedure 30 provides in pertinent part as follows:

Rule 30. **Depositions Upon Oral Examination**

(a) *When Depositions May be Taken.* After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), . . .

Fed. R. Civ. P. 30(a).

Federal Rule of Civil Procedure 33 provides in pertinent part as follows:

Rule 33. **Interrogatories to Parties**

(a) *Availability; Procedures for Use.* Any party may serve upon any other party written interrogatories to be

answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

. . . .

(b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

. . . .

Fed. R. Civ. P. 33(a), (b).

Federal Rule of Civil Procedure 34 provides in pertinent part as follows:

Rule 34. **Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes**

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; . . .

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. . . .

Fed. R. Civ. P. 34(a), (b).

Federal Rule of Civil Procedure 36 provides in pertinent part as follows:

Rule 36. **Requests for Admission**

(a) *Request for admission.* A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. . . . The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

. . . .

Fed. R. Civ. P. 36(a).

Federal Rule of Criminal Procedure 16 provides in pertinent part as follows:

Rule 16. **Discovery and Inspection**

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

. . . .

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant

to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

Fed. R. Crim. P. 16(a)(1)(C).

Rule 6 Governing Section 2255 Proceedings for the United States District Courts provides in pertinent part as follows:

Rule 6. **Discovery**

(a) Leave of court required. A party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a movant who qualifies for appointment of counsel under 18 U.S.C. § 3006A(g).

(b) Requests for discovery. Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

28 U.S.C.A. foll. § 2255, Rule 6.

STATEMENT OF THE CASE

Petitioner, on January 30, 1976, filed a motion in the nature of a writ of error *coram nobis* in the United States District Court for the Southern District of Illinois, pursuant to 28 U.S.C. § 1651(a) (1970), seeking collaterally to attack his judgment of conviction (O.R. 1).[1] The pertinent allegations of petitioner's motion[2] are summarized as follows:

Petitioner and his secretary, Jennie Alioto, were indicted on January 6, 1965, in three counts; count one charging both defendants with conspiracy to evade income taxes, and count two and three charging only petitioner with income tax evasion for 1959 and 1960 (O.R. 21-1; App. 15). Count one of the indictment was subsequently dismissed (O.R. 21-2; App. 15-16).

The government in its investigation of petitioner engaged in unlawful activities. Jennie Alioto's office-apartment was broken into, and an unlawful electronic surveillance was maintained therein for nearly nine months. On two separate other occasions, her apartment was illegally entered, and evidence was unlawfully seized (O.R. 21-2; App. 16).[3] The government also

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[1] "O.R." references are to the Original Record; "App." references hereinafter used are to the printed Appendix, and "Tr. 2-28-77" and "Tr. 10-31-78" references hereinafter used are to the separate transcripts of proceedings on February 28, 1977 and October 31, 1978, respectively, filed in the United States Court of Appeals for the Seventh Circuit.

[2] Petitioner subsequently twice amended his motion in the nature of a writ of error *coram nobis* (O.R. 18, 21; App. 15-27). All three of the motions are substantially the same, the latter two motions presenting a more specific set of facts and surrounding history. The last amended motion will be the one referred to hereinafter.

[3] As to one of those occasions, the United States District Court for the Eastern District of Wisconsin held that the search warrant and search were invalid and unlawful and ordered that all of the property seized in connection therewith be returned. *See Alioto* v. *United States,* 216 F. Supp. 48 (E.D. Wis. 1963).

maintained another illegal electronic surveillance at petitioner's office for over a year (O.R. 21-3; App. 16-17). Petitioner uncovered this unlawful electronic microphone and filed a motion to suppress. At a hearing on the motion to suppress, the government produced various log summaries, transcripts, and airtels relative to the unlawful electronic surveillance at Jennie Alioto's apartment and petitioner's office. The government also produced a set of papers which it assured the district court did not relate to petitioner's case, but which petitioner later discovered was an unlawful electronic surveillance by the government for nearly six months of the law offices of petitioner's attorney, Dominic Frinzi (O.R. 21-3; App. 17).

Also at that hearing, the government stated to the court that the materials turned over were all it had; that it had no reason to believe that there was anything more; and that in the event any additional material was brought to its attention, it would bring it to the court's attention, and, if appropriate, turn it over to the defense (O.R. 21-4; App. 18).

Petitioner's trial began the next week (O.R. 21-4; App. 18). Simultaneously with the trial, the district court conducted a suppression hearing, and eventually overruled petitioner's motion to supress and his objections to the admissibility of certain evidence (O.R. 21-5, 6; App. 19-20).

On March 23, 1967, the jury rendered a verdict of guilty on both counts. On September 18, 1967, the court entered a judgment of conviction and sentenced petitioner to two concurrent terms of two years imprisonment and a fine of $5,000.00 on each count (O.R. 21-6; App. 20).

The judgment was affirmed by the United States Court of Appeals for the Seventh Circuit, *United States* v. *Balistrieri,* 403 F.2d 472 (7th Cir. 1968),[4] and certiorari was denied by this Court. *Balistrieri* v. *United States*, 394 U.S. 985 (1969).

[4] All of the unlawful activity and electronic surveillance on the part of the government set forth *ante* was the subject *inter alia* of defendant's first appeal. *United States* v. *Balistrieri,* 403 F.2d 472, 474-78 (7th Cir. 1968).

Thereafter, in response to a petition for rehearing in the Supreme Court, the Solicitor General disclosed that petitioner was overheard during the course of an illegal electronic surveillance in Chicago. This Court granted the petition for rehearing, vacated the order denying certiorari, and remanded the case to the district court. *Balistrieri* v. *United States,* 395 U.S. 710 (1969).

On remand, petitioner also filed a motion for new trial. A hearing was held at which it was determined that the government had not disclosed to petitioner that it had for over six months maintained the unlawful electronic surveillance in Chicago, during the course of which petitioner was overheard. After the hearing, the district court overruled the motion for new trial and re-entered the judgment and sentence (O.R. 21-7; App. 21). The court of appeals again affirmed the judgment, *United States* v. *Balistrieri,* 436 F.2d 1212 (7th Cir. 1971),[5] and certiorari was denied, *Balistrieri* v. *United States,* 402 U.S 953 (1971). Petitioner subsequently served his sentence (O.R. 21-7; App. 21).

Many times in the course of the above proceedings, the government had been ordered by courts to produce for inspection *all* tapes, transcripts, and logs containing electronic monitoring of petitioner (O.R. 21-8; App. 22).

In 1975, petitioner discovered that the government had maintained yet another unlawful electronic surveillance of long duration at a restaurant he frequented, in Milwaukee, Wisconsin. (O.R. 21-7; App. 21). The government never disclosed to peti-

[5] The overhearing of petitioner in Chicago, during the course of the government's undisclosed unlawful electronic surveillance, *inter alia,* was the subject of petitioner's second appeal. *United States* v. *Balistrieri,* 436 F.2d 1212, 1213-15 (7th Cir. 1971).

tioner this unlawful restaurant surveillance, but petitioner learned of such surveillance coincidentally from an affidavit submitted by the government in a different person's criminal case.[6]

Petitioner incorporated this affidavit as Exhibit "B" to his motion in the nature of a writ of error *coram nobis*. Petitioner alleged in his motion that he had many occasions to be in the restaurant and had conversations there with many individuals concerning his business interests pertinent to the issues of his criminal trial (O.R. 21-8; App. 22). Petitioner also incorporated in his motion his own affidavit, in which he stated that several of his conversations at the restaurant dealt with topics relating to his income tax liability, and set forth the names of friends, associates, and defense witnesses at his criminal trial who had met and discussed with him topics relating to his income tax (O.R. 1-Exhibit "C"). Additionally, incorporated in petitioner's motion were the affidavits of four persons, which stated that those affiants frequented the restaurant, had witnessed petitioner conversing with many individuals, had themselves conversed with petitioner, and that several of the conversations related to petitioner's income tax liability (O.R. 1-Exhibits "D", "E", "F", and "G").

Petitioner further alleged in his motion that he was the subject of the unlawful microphone surveillance conducted by the

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[6] In the case of *United States* v. *Brodson*, No. 74CR98 (E.D. Wis.), Gregory H. Ward, Special Attorney, U.S. Department of Justice, submitted an affidavit dated February 11, 1975, in response to a request by defendant Brodson, as to whether he had ever been monitored by electronic surveillance. In pertinent part, the affidavit of Gregory H. Ward states in paragraph 4 as follows:

> "Sidney A. Brodson was possibly a participant in conversations monitored by the Federal Bureau of Investigation on September 10, 1964, during a microphone surveillance from June 10, 1964 through February 5, 1965. Such surveillance involved Walter Felix Brocca's restaurant, 519 West Wells Street, Milwaukee, Wisconsin."

government; that the government overheard his conversations and obtained evidence and/or leads from which evidence was obtained, which led to his conviction, and that had petitioner known of the restaurant surveillance, it would have enabled him to better prepare his defense (O.R. 21-8, 9; App. 22-23).

The government filed its response to petitioner's motion, attaching thereto an affidavit signed by Geir N. Magnesen, a special agent of the F.B.I., dated March 24, 1976 (O.R. 2; 3; App. 6-7). The affidavit stated that "[t]he recorded tapes were destroyed . . . and no transcripts were prepared," but "only the monitoring logs were maintained," and that "[a] review of the logs indicated that Frank Peter Balistrieri was incidentally overheard on July 24, 1964, in which the following notation appears: 'Man No. 2 is Frank B. He can't be understood at all—talks too low at this point.' " The affidavit further stated:

> "In addition, on July 24, 1964, the following entry appears: 'unknown male (Frank) talks very softly, says Cliff, Frank, anybody call? Oh, . . . (unable to hear few words). . . . Well, I'll be there in about 20 minutes, soon as they call—let me know. Alright. Hangs up. (Unable to determine if it was Frank B.)' On September 30, 1964, the following entry appears: 'Blackie greeted man as Frank. Normal restaurant business. No conversations.'
>
> "The exact identity of the individuals monitored on July 24, 1964, and September 30, 1964, was not determined at the time of monitoring.
>
> *"A complete review of the logs indicates that Frank Peter Balistrieri was not monitored on any occasion at 519 West Wells Street with the exception of those noted and those log entries have been included in their entirety."*

(O.R. 3; App. 6-7) (Emphasis supplied).

Subsequently, petitioner requested a date for an evidentiary hearing and a date was set by the district court. Meanwhile, peti-

tioner had filed discovery requests upon the government under the Federal Rules of Civil Procedure in the form of a request for admissions (O.R. 4), interrogatories (O.R. 5; 7), and a request for the production of documentary evidence (O.R. 6).[7] Petitioner also served notice to take the depositions of five persons, three of whom were government agents who had worked on petitioner's criminal case. (O.R. 9). The government moved to quash all of the civil discovery requests (O.R. 8), moved to quash the taking of depositions (O.R. 9), and the evidentiary hearing was cancelled.

On December 3, 1976, the court entered its order granting the government's motions to quash for the reasons that "[a] motion in the nature of a writ of error *coram nobis* is but a step in the criminal case," and that "[s]ubjecting the Government to costly and time consuming inquiries into matters long closed through the broad latitudes of civil discovery is not justified." (O.R. 10-4; App. 9-12). (Appendix C, *infra* at A15).

Petitioner thereafter filed requests for production and inspection under Rule 16 of the Federal Rules of Criminal Procedure (O.R. 11), a request for the production and inspection of all evidence in possession of the government favorable to the defendant (O.R. 12) and a motion for production of Jencks Act

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[7] Among other things, the discovery requests sought information concerning the receipt of any information by attorneys representing the government in petitioner's criminal trial from the electronic surveillance at the restaurant; the identity of persons who installed the microphone, who monitored the microphone surveillance, and who directed or ordered the installation or monitoring of the microphone surveillance at the restaurant; the purpose for and target individual of the installation of the microphone surveillance at the restaurant; information relative to overhearing of the conversations of the persons who gave the affidavits to petitioner's motion, as well as the production and inspection of all the monitoring logs and a request for admissions necessary for sustaining petitioner's burden of proving his motion (O.R. 4; 5; 6; 7).

(18 U.S.C. § 3500) statements and reports of witnesses (O.R. 13).[8] The government filed its response to petitioner's criminal discovery requests, stating that it had nothing to turn over to petitioner in response to his request for favorable evidence, and opposed turning over to the petitioner the monitoring logs themselves. The government offered instead to turn over the monitoring logs to the court for an *in camera* inspection. (O.R. 14).

The government also attached to its response to defendant's criminal discovery requests a second affidavit of Geir N. Magnesen, dated February 4, 1977, which stated as follows:

> "A review of the logs indicates on July 25, 1964 the following mention is made of Frank Balistrieri. The parties are identified as 2 or 3 unknown males, one of whom is thought to be Walter Brocca and another called 'John.' The log indicates the following, 'They mention Mr. Balistrieri and $50.00 in their conversation at the very beginning as tape was being set and not caught on tape.'
>
> "On October 23, 1964 the following mention is made of a Balistrieri, first name not identified, the statement is made by Walter Brocca as follows:
>
> " 'Was you out to see Frank? You meet my compradre, Frank? Balistrieri. Well what did he say? Did he ask about me? I was wondering if he asked about me. How is he, all

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[8] The criminal discovery requests sought much the same information as contained in the civil discovery requests, including, among other things, production and inspection of the monitoring logs or at least the logs for conversations overheard of those persons who gave affidavits incorporated in defendant's motion, and the identities of any attorney representing the government in petitioner's criminal trial who knew of electronic surveillance at the restaurant, and of all persons who installed, monitored or directed the installation or monitoring of electronic surveillance (O.R. 11; 12; 13).

right? We ain't doing nothing here. No. No. Frankie's mad a me too. You talk to him? No, I mean lately. Was he good to you? Had a long talk with him, uh? Who did they kill? (B. says an Italian type name but too loud to copy). Ya, I know about that. (Remainder of conversation, which is very short, completely overriden by noise—someone opened tavern door and left it that way.'

"No additional references by identified nor unidentified individuals are made to Frank Peter Balistrieri, nor could any business dealings be identified as relating to Frank Peter Balistrieri."

(O.R. 15-2; App. 13).

Petitioner thereafter filed a motion to compel the criminal discovery (O.R. 16).

An evidentiary hearing was again scheduled, and petitioner served subpoenae duces tecum on witnesses to appear at that hearing. The government orally moved to quash the subpoenae duces tecum[9], and tendered to the court the monitoring logs of the electronic surveillance at the restaurant for an *in camera* inspection. The evidentiary hearing was again continued (Tr. 2-28-77, pp. 3-8). Subsequently, the government requested that petitioner's motion in the nature of a writ of error *coram nobis* be dismissed without an evidentiary hearing.

On September 14, 1977, the court entered its order setting forth the material from its *in camera* inspection of the monitoring logs to which the court held petitioner entitled. (Appendix D, *infra* at A17-19). The court found two additional conversations of petitioner not previously contained in Geir N. Magnesen's affidavit of March 24, 1976. One of these was a conversation where petitioner had met with the co-defendant, Jennie Alioto, and his attorney, Dominic Frinzi, as follows:

[9] The government later filed a written motion to quash the subpoenae duces tecum (O.R. 20).

"7-25-64 at 12:42 a.m.—'Music starts. Discussion on current political situation. Man No. 1 is Dominic Frenzi—heard to say that Republican Party can't afford to do—Dominic orders three cups of coffee. Jenny called out she wanted coke. Man No. 2 is Frank B. He can't be understood at all—talks too low at this point. Frenzi continues talking. Mentions Republican Party all the time and cussed Goldwater especially in regard to CR and platform. Joking and laughing. Not audible. Conversation about the DA in Kenosha in joking manner followed by more laughter. Other customers coming and going. Cash register ringing. Frenzi wants to go home and get some sleep. Frank B. heard to say something, but not audible. Somebody wants to buy some drinks on way out—cash register rings, good nights are exchanged, at 1:08 a.m., Restaurant becomes quiet but placed on record.' "

The other conversation disclosed by the Court was on 8-6-64, at 8:27 p.m., as follows:

"Two men enter—one is Blackie. Directs other to where the cold water is. Blackie went to cash register—apparently got some change out, as thereafter jukebox started up blocking all conversation. By tone of companion's voice, possibly Frank B. Radio turned on to a ball game also."[10]

The court denied the remainder of petitioner's request for criminal discovery (Appendix D, *infra* at A18).

On October 31, 1978, at the oral argument on the government's request for summary dismissal, the government for the

[10] The order failed to mention the overhearings of petitioner on July 24, 1964 and September 30, 1964 contained in Geir N. Magnesen's first affidavit dated March 24, 1976, and the affidavit of Geir N. Magnesen failed to mention the two overhearings of petitioner contained in the district court's order of September 14, 1977.

first time clarified that there were two overhearings of petitioner—one on July 24, 1964, contained in Geir N. Magnesen's affidavit of March 24, 1976, the other on July 25, 1964, contained in the court's order of September 14, 1977, and that the government knowing of the July 25, 1964 overhearing did not include the July 25, 1964 overhearing in Geir N. Magnesen's affidavit. (Tr. 10-31-78, pp. 42-43).

On November 10, 1978, the court entered its order summarily denying petitioner's motion in the nature of a writ of error *coram nobis* (O.R. 26; App. 33-35) (Appendix E, *infra* at A20-22).

The court held that petitioner was not the object of the surveillance, and found that the recorded conversations involving the petitioner were clearly innocuous. As to the conversation of July 25, 1964, where petitioner was overheard with his attorney, the court found that conversation was "merely social in nature," and held that "an evidentiary hearing would serve no useful purpose" (O.R. 26-3; 4; App. 35) (Appendix E, *infra* at A22).

On October 2, 1979, the United States Court of Appeals for the Seventh Circuit entered its judgment and opinion affirming the district court's order (Appendix A, *infra* at A1-11). The court of appeals after first stating that "this appeal presented an interesting issue of first impression" as to whether "on a motion in the nature of a writ of error *coram nobis* to vacate a judgment of conviction in a criminal case, should the district court apply the Federal Rules of Civil Procedure or the Rules of Criminal Procedure," found that "the district court may draw from both sets of rules." (Appendix A, *infra* at A1). However, the court, relying upon Rule 6 of the Rules Governing Section 2255 Proceedings, and Fed. R. Civ. P. 26(c), held that the district court "was acting well within its discretion" in disallowing the discovery requests by petitioner. The court determined in effect that the revelation gained from the *in camera* inspec-

tion of the monitoring logs that the petitioner and his attorney were overheard by the government's unlawful electronic surveillance, was not significant or relevant enough to warrant granting petitioner any discovery or an evidentiary hearing. (Appendix A, *infra* at A8-10).

Petitioner filed a timely petition for rehearing, which was denied on December 6, 1979 (Appendix B, *infra* at A12).

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts With Many Decisions of This Court as to the Proper Relief and Procedure to be Afforded an Individual Seeking Postconviction Relief Where the Government Has Concealed a Surreptitious Intrusion Into the Attorney-Client Relationship During Extensive Unlawful Electronic Surveillance.

The decisions of this Court have established the following standards for determining whether a claim for postconviction relief is on its face without merit: whether the allegations of the claim when viewed against the record are "vague," "conclusory," "palpably incredible," or "patently frivolous or false." If the claim is without merit on its face, then the postconviction motion may be summarily dismissed. *Blackledge* v. *Allison,* 431 U.S. 63, 75-76 (1977); *Machibroda* v. *United States,* 368 U.S. 487, 495 (1962); *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116, 119 (1956). The Court has further held, with respect to a claim on its face not without merit, that constitutional due process entitles an individual to "careful consideration and plenary processing" of his claim. *Blackledge* v. *Allison*, *supra* at 82-83; *Harris* v. *Nelson*, 394 U.S. 286, 298 (1969). This does not necessarily require a full evidentiary hearing, but, nevertheless, does demand some alternative procedures by which an individual can present the relevant facts of his claim. *Blackledge* v. *Allison, supra* at 80-83. One of these alternative procedural methods is by means of discovery. *Blackledge* v. *Allison, supa* at 81. The decision below, in upholding summary dismissal of petitioner's claim without affording him any discovery, directly conflicts with the above decisions of this Court.

Undoubtedly, the conflict lies in the failure of the court below to apply the above standards for determining whether a

postconviction claim is on its face without merit. Petitioner respectfully submits that the allegations of the instant motion, when viewed against the record, are not at all vague, conclusory, palpably incredible, or patently frivolous or false. *See Blackledge* v. *Allison, supra; Machibroda* v. *United States, supra; Pennsylvania ex rel. Herman* v. *Claudy, supra.* For by reason of the government's admissions contained in Geir N. Magnesen's two affidavits (O.R. 3; 15-2; App. 6-17, 13) and the court's *in camera* inspection of the monitoring logs (O.R. 25-2; App. 33) (Appendix D, *infra*), petitioner has indeed demonstrated much of the allegations of his motion.[11] Thus, petitioner has already demonstrated that the government conducted an electronic surveillance of the restaurant for nearly six months, that petitioner was overheard during the restaurant surveillance on at least four occasions, and that on one of those occasions, the government had surreptitiously intruded into his relationship with his attorney. Yet, petitioner has been foreclosed from proceeding further, either by way of discovery or by

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[11] In light of the record, it is apparent that the allegations of petitioner's motion are neither vague, conclusory, palpably incredible, nor patently frivolous or false. Petitioner incorporated into his motion as an exhibit an affidavit in which he stated that several conversations at the restaurant dealt with topics relating to his income tax liability, specifically identifying individuals with whom he had these conversations (O.R. 1-Exhibit "C"). He also incorporated into his motion as exhibits the affidavits of friends, acquaintances, and witnesses at his criminal trial, likewise stating that the affiants had seen petitioner conversing with many individuals and had themselves conversed with petitioner on topics relating to petitioner's income tax liability at the restaurant (O.R. 1-Exhibits "D" - "G").

Of course, the allegation in petitioner's motion that the government maintained an unlawful electronic surveillance at the restaurant is meritorious. The government has already admitted as much, and additionally admitted that it destroyed the original tape recordings of the surveillance. (O.R. 2; 3-1; 15-1; 19; App. 6, 12). The allegation that petitioner was overheard by the restaurant surveillance is neither vague, conclusory, incredible, frivolous, nor false. Geir N. Magnesen's affidavit (O.R. 3; App. 6-7) and the court's Order of

an evidentiary hearing, to prove to the court the legitimacy of the remaining allegations of his motion.[12]

As such, the opinion below also conflicts with the following decisions of this Court: *Alderman* v. *United States*, 394 U.S. 165 (1969); *Giordano* v. *United States*, 394 U.S. 310 (1969); *Kolod* v. *United States*, 390 U.S. 136 (1968); *Hoffa* v. *United States*, 387 U.S. 231 (1967); *O'Brien* v. *United States*, 386 U.S. 345 (1967) (*per curiam*); *Black* v. *United States*, 385 U.S. 26 (1966) (*per curiam*); *United States* v. *Schipani*, 362 F.2d 825 (2d Cir. 1966), *cert. denied*, 385 U.S. 934, *rehearing granted, judgment vacated, and case remanded*, 385 U.S. 372 (1966); *United States* v. *Markis*, 352 F.2d 860 (2d Cir. 1965), *cert. granted, judgment vacated, and case remanded for new trial*, 387 U.S. 425 (1967); *United States* v. *Moretti*, 353 F.2d 672 (2d Cir. 1965), *cert. granted, judgment vacated, and case remanded for new trial*, 387 U.S. 425 (1967). In all of these cases, on facts equally, if not less compelling than the instant case, this Court, being apprised of an undisclosed unlawful eavesdropping on the part of the government, required, at a bare minimum, an evidentiary hearing by the district court.

September 14, 1977 (O.R. 25; App. 31-33) (Appendix D, *infra*) confirms those allegations. Moreover, the government was ordered by various courts many times to produce all electronic surveillance in which petitioner was overheard, but it was not until September 14, 1977, that petitioner learned from the court's *in camera* inspection that he had been overheard in conversation with his attorney and the co-defendant. Certainly, the attorney, petitioner, and co-defendant would have been available to testify at an evidentiary hearing as to what the government overheard on that occasion, if they had been given the opportunity.

[12] In a situation such as here, the government controls and has in its possession much of the evidence that would prove up the allegations of petitioner's motion. Yet, how can petitioner be reasonably expected to substantiate his allegations absent discovery or an evidentiary hearing, where the government destroys the best evidence of the tapes and fails to make a full disclosure of what the logs contain? Thus, petitioner is being penalized for the government's indiscretion in destroying the tapes.

In two of those decisions, *Black* v. *United States, supra* and *O'Brien* v. *United States, supra,* the Court, upon learning of an undisclosed surreptitious intrusion into the attorney-client relationship, reversed the petitioners' convictions and remanded the cases to the district court for a new trial.

In *Black* v. *United States, supra,* the Solicitor General voluntarily advised the Court after certiorari had been denied, that F.B.I. agents in an unrelated matter had monitored and taped conversations in petitioner's hotel suite. During this electronic surveillance, the government overheard conversations between petitioner and his attorney. Recordings of such interceptions had been erased, but notes summarizing and sometimes quoting the conversations were available, and reports and memoranda of the conversations had been made. The reports and memoranda were included in material transmitted to the attorneys responsible for the prosecution of the case, and were retained by them until petitioner's trial began. The attorneys never realized until the case was in the Supreme Court that any conversations between petitioner and his attorney were overheard. The Solicitor General also advised that the attorneys had found nothing in the reports or memoranda of relevance to the criminal case, and suggested that the case be remanded for an evidentiary hearing at which the district court would determine whether the conviction should stand. Memorandum for United States in *Black* v. *United States*, O.T. 1965, No. 1029, p. 4. The Court, in a *per curiam* opinion without anything more before it than the representations made by both sides, rejected the Solicitor General's suggestion that the case be remanded for an evidentiary hearing, and instead reversed the conviction and remanded the case for a new trial.

In *O'Brien* v. *United States, supra,* the Court, in a *per curiam* opinion, relied on its previous decision in *Black* v. *United States, supra,* and reversed petitioner's conviction and remanded the case to the district court for a new trial, again over the Solicitor General's suggestion that the case be remanded for

only an evidentiary hearing. There the Court had been informed by the Solicitor General that two conversations of petitioner were overheard by monitoring agents during the course of an electronic surveillance of a commercial establishment owned by an acquaintance of petitioner. The petitioner was not the subject of the surveillance. The conversations were not mentioned in any F.B.I. report, nor were its contents communicated to attorneys for the Department of Justice, including those who prosecuted the case. No evidence introduced at the trial was tainted in any manner by leads obtained from the overheard conversations. One of the two conversations involved a telephonic request to petitioner's attorney to file an application relating to the territorial conditions of petitioner's release on bail. The attorney's words were not overheard. Brief for United States in *O'Brien* v. *United States,* O.T. 1966, No. 823, pp. 10-12.

In both of these cases, the Court was apparently unconcerned with the relevance or irrelevance of the conversations overheard by the government or the prejudice to the petitioner. Rather, the Court held that the government's conduct in intruding into the attorney-client relationship, coupled with the government's failure to disclose such intrusion until after conviction was sufficient in those cases to warrant a new trial. The basis for granting such relief was "that *justice* requires that a new trial be held so as to afford the petitioner an opportunity to protect himself . . ." *Black* v. *United States, supra* at 28-29 (Emphasis supplied). In both *Black* and *O'Brien,* Justices Harlan and Stewart dissented. In *Black*, the dissent concluded that the policy of the majority could be justified only on the basis "that any governmental activity of the kind here in question *automatically* vitiates, so as to at least require a new trial, any conviction occurring during the span of such activity." *Black* v. *United States*, 385 U.S. 26, 31 (1966) (dissenting opinion). *Accord, O'Brien* v. *United States*, 386 U.S. 345, 346-47 (1967) (dissenting opinion). *See also Hoffa* v. *United States*, 385

U.S. 293, 307 (1966); *Hoffa* v. *United States,* 387 U.S. 231, 233 (1967). *But see Weatherford* v. *Bursey,* 429 U.S. 545, 550-53 (1977).

In any event, petitioner is unaware of a single decision of this Court, where after uncovering as much concealed government misconduct as has surfaced here, a claimant is totally precluded from access to the court, and is denied not only an evidentiary hearing, but discovery as well. *A fortiori*, if the identical kind of government misconduct is sufficient to warrant a new trial in *Black* and *O'Brien*, then it should entitle petitioner here at the very least to discovery.

The above decisions of this Court were cited in petitioner's brief to the court of appeals as authority for the proposition that the instant case should be remanded to the district court to afford petitioner, at the very minimum, some discovery. *See* Brief for Defendant-Appellant at pp. 20-23, 31-32, 36-37.[13] Yet,

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[13] At the very least, petitioner should have been granted inspection of the monitoring logs and given the identity of all persons who installed, monitored or directed the installation or monitoring of the electronic surveillance, and of any attorney representing the government in petitioner's criminal trial who knew of the electronic surveillance (O.R. 5; 6; 11; 12). It is necessary for petitioner to make the inspection of the monitoring logs, because no other person is equipped to do as thorough a job as he, in reviewing the tremendous amount of material contained in the logs. Only petitioner is able to appreciate fully the significance of certain conversations. What may be considered a chance remark or trifling to some, when put into the proper connotation, would take on a different perspective of importance to petitioner. And what actually occurred in the instant case bears this out. For the government found two conversations where petitioner was overheard, which passed the district court unnoticed, and *vice versa*. Compare O.R. 3-2; App. 7 with O.R. 25-2; App. 32.

not one of those decisions is distinguished in the opinion below, or for that matter even cited. Instead, the opinion below cites the decision of *Coplon* v. *United Staes*, 191 F.2d 749 (D.C. Cir. 1951) *cert. denied*, 342 U.S. 926 (1952) for the statement that "illegal eavesdropping by the government on attorney-client conversations may be a violation of a defendant's Sixth Amendment rights, and therefore, grounds for a new trial in some cases" (Appendix A, *infra* at A10). Surely, the court below has misconstrued the *ratio decidendi* of *Coplon*, for the decision below further holds that "Balistrieri was not prejudiced."[14] (Appendix A, *infra* at A11). The very crux of *Coplon*, however, is that prejudice need not be shown to set aside a conviction because of unlawful governmental intrusion into the attorney-client relationship. *See Hoffa* v. *United States*, 385 U.S. 293, 307 (1966); *Caldwell* v. *United States*, 205 F.2d 879 (D.C. Cir. 1953).

[14] In reaching this conclusion that "Balistrieri was not prejudiced," the opinion misapprehends many important facts. Thus, the opinion states that "the restaurant discussion occurred more than two years prior to Balistrieri's trial for tax evasion" (Appendix A, *infra* at A10), but neglects to mention that the discussion occurred during the investigation for which petitioner was indicted and that the indictment was returned a few days after the unlawful electronic surveillance was terminated. Secondly, the opinion states: "The surveillance at Brocca's restaurant was not directed at Balistrieri." (Appendix A, *infra* at A11). However, petitioner's motion specifically alleges in paragraph 29 that: "On information and belief, defendant states that he was the subject of the unlawful microphone surveillance conducted by the government at Walter Felix Brocca's restaurant . . . ." (O.R. 21-8; App. 22). *See also* petitioner's interrogatory number 11 (O.R. 5-2; 7) and request for admissions 1(a) and 1(b) (O.R. 4-1). Additionally, the opinion states: "The monitored conversations had nothing to do with Balistrieri's tax affairs or any legal matter affecting him." (Appendix A, *infra* at A11). However, paragraph 28 of petitioner's motion alleges that petitioner "had sundry and diverse conversations . . . with many individuals concerning [his] business interests pertinent to the issues of this criminal trial." Paragraph 29 alleges "that during such illegal surveillance, the government overheard his conversations and obtained evidence and leads from which evidence was obtained, all of which led to [his] conviction." (O.R. 21-8; App. 22). Additionally, in that regard, petitioner attached his own affidavit (O.R. 1-Exhibit 'C") and attached four affidavits of

In his petition for rehearing, petitioner pointed out to the court of appeals the inconsistency of the decision below with all of the above decisions of this Court. In particular, it pointed out that the opinion below did not consider the decisions of *Harris* v. *Nelson*, 394 U.S. 286 (1969); *Blackledge* v. *Allison*, 431 U.S. 63 (1977); *Black* v. *United States*, 385 U.S. 26 (1966); and *O'Brien* v. *United States*, 386 U.S. 345 (1967), and that the opinion below failed to apply the appropriate standards in order to summarily dismiss petitioner's motion, as set forth in *Machibroda* v. *United States*, 368 U.S. 487, 495 (1962), *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116, 119 (1956), and *Blackledge* v. *Allison, supra* at 75-76, all of which were controlling precedent. (Petition for Rehearing, at pp. 4, 6, 7-8).

Accordingly, the opinion below has substituted for the decisions of this Court an extremely pragmatic approach on the important issues of the proper relief and the appropriate procedure to be afforded individuals seeking postconviction relief insofar as the fundamental right to due process is concerned. Under the opinion below, petitioner has been allowed no procedural means by which he can present his claim to the district court, and thereby has been denied due process. The fact that the district court conducted an *in camera* inspection of the monitoring logs does not even remotely satisfy the due process requirement of "careful consideration and plenary processing of [petitioner's claim] including full opportunity for presentation of the relevant facts," as required by *Harris* v. *Nelson*,

persons who swore that at the restaurant they had conversations with petitioner concerning his income tax liability (O.R. 1-Exhibits "D" -"G"). *See also* petitioner's interrogatories numbered 9 and 10 (O.R. 5-2). Further, petitioner requested production of the monitoring logs, under both Fed. R. Civ. P. 34 and Fed. R. Crim. P. 16, which would have provided the basis for petitioner corroborating those affidavits (O.R. 6; 12). Lastly, the decision below states that "[a] third person was present" at the overheard conversation between petitioner and his attorney. (Appendix A, *infra* at A11). However, the opinion below neglects to mention that the third person was the co-defendant Jennie Alioto.

supra, at 298, and *Blackledge* v. *Allison*, *supra*, at 82. That the *in camera* inspection uncovered two additional overhearings not previously disclosed by the government, one of which was a surreptitious intrusion into the attorney-client relationship, only serves to bolster petitioner's *coram nobis* motion and underline the necessity for petitioner himself reviewing the monitoring logs.

Neither the expediency desired in bringing "old criminal proceedings" to a "speedy conclusion," nor the practicality of protecting the government and witnesses from the "burden of discovery" (Appendix A, *infra* at A9-10), should ever deprive an individual of the opportunity to support a potentially meritorious claim. For to do so is to sacrifice cautious, deliberate, and intelligent consideration necessary for due process, to whim, convenience, and conjecture. Unfounded conclusions, as in the opinion below, that a postconviction claimant is not prejudiced, without any testimony or discovery, and without any logical basis, ought never serve to deny an individual his day in court.

II.

The Decision Below Raises Significant and Recurring Questions Concerning What Constitutes a Sufficient Opportunity for Presentation of a Postconviction Claim Under Due Process and What Relief Should be Afforded a Postconviction Claimant, Who, After Conviction, Uncovers a Surreptitious Government Intrusion Into His Attorney-Client Relationship.

Aside from the obvious question, deemed "an interesting issue" by the court of appeals, as to what rules of procedure apply in *coram nobis* proceedings,[15] the decision below more im-

[15] By virtue of the landmark decision in *United States* v. *Morgan*, 346 U.S. 502 (1954), jurisdiction over a motion in the nature of a writ of error *coram nobis* is conferred on the federal committing court to test the validity of sentences completely served, pursuant to the All Writs Act of the Judicial Code (28 U.S.C. §1651(a)). However, since *Morgan*, confusion has arisen with respect to the issue of the applicable procedure to be followed in *coram nobis* proceedings, in large measure due to footnote 4 of the *Morgan* opinion. which states: "Such a motion is a step in a criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding." 346 U.S. at 505 n.4. On this issue there is a conflict in the decisions. Compare the opinion below with *United States* v. *Mills*, 430 F.2d 526, 528 (8th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971); and *United States* v. *Marcello*, 202 F. Supp. 694 (E.D. La. 1962), with *Neely* v. *United States*, 546 F.2d 1059, 1064-67 (3d Cir. 1976), *United States* v. *Keogh*, 391 F.2d 138, 140 (2d Cir. 1968), *Burns* v. *Alabama*, 377 F.2d 233, 235, (5th Cir. 1967), and *Jones* v. *Squier*, 195 F.2d 179, 180 (9th Cir. 1952). By the treatment given this issue above, petitioner does not mean to infer that this issue is not worthy of certiorari, but rather to the contrary, petitioner merely suggests that beside this issue, there is the broader, far-reaching, and more significant issue concerning the due process rights of all persons seeking postconviction relief, which the two courts below have apparently ignored.

portantly raises the question of what constitutes a sufficient opportunity for presentation of a postconviction claim in order to satisfy the requirements of due process. In *Blackledge* v. *Allison, supra,* a case involving a habeas corpus petition seeking to set aside a state conviction based on an alleged involuntary plea, this Court last recognized that summary dismissal of the claim was not warranted, unless the claim, when viewed against the record, was on its face without merit. In that case, after finding summary dismissal improper, this Court stated that "this is not to say that every set of allegations not on its face without merit entitles a habeas corpus petitioner to an evidentiary hearing." 431 U.S. at 80. The court suggested certain alternative procedures, pursuant to Rules 6 and 7 of the Rules Governing Section 2254 Cases, such as a motion for summary judgment, discovery, or expansion of the record. 346 U.S. at 80-82. However, this Court did not delineate any criteria for determining the limits a district court can place upon these alternative procedures, and especially discovery, including produc-

tion and inspection of documents. Thus, the question of exactly at what stage of a postconviction proceeding a district judge may properly dismiss a claim which is potentially meritorious, without permitting an evidentiary hearing or alternative procedures, is a significant, recurring, and troublesome one, which has gone unanswered.

At the heart of the matter lies the inability of a federal judge to determine allegations of meritorious claims for constitutional violations, if the claimant is afforded no opportunity to present the claim. More particularly, Rule 6 of the Rules Governing Section 2254 Cases, and the nearly identical Rule 6 of the Rules Governing Section 2255 Proceedings permit discovery only "to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." Viewed in light of both of these rules, the other side of the issue involves the question of what under due process constitutes an abuse of discretion by a district court in disallowing discovery requests.[16] In that regard, the decision below adopts a balancing of interest approach to conclude that the district court did not abuse its discretion, as follows:

> "For reasons of policy, as well as the consistency of legal concepts, it is necessary to grant applicants the scope of discovery under civil rules and, at the same time, assure the government and others of due protection from burdens arising from participation in old criminal proceedings. The district court should consider the amount of time which has elapsed since the trial, the burden of discovery on the government and witnesses, and the nature of the

[16] In a different context, the United States Court of Appeals for the Third Circuit has held a plaintiff entitled to answers to interrogatories before the district court can grant summary judgment on a case brought under 42 U.S.C. §1983 (1970) for interference with the attorney-client relationship. *Via* v. *Cliff*, 470 F.2d 271, 276 (3d Cir. 1972).

> applicant's claims in deciding on the scope of discovery at each stage of the coram nobis proceedings. If relevant evidence is revealed by discovery which only lightly burdens the government, the court retains the option of allowing more extensive requests in order to see if there is more evidence to be found. However, if examination of only the most relevant materials fails to turn over any relevant new stones, the coram nobis proceedings may be brought to a speedy conclusion."

(Appendix A, *infra* at A9-10).

The illogic of such a balancing of interest approach is evident in the finding below that Fed. R. Crim. P. 16 "is an unsatisfactory vehicle for discovery requests in proceedings on a *coram nobis* motion." (Appendix A, *infra* at A9). The reason for such an assertion is that facts affecting "the validity of the conviction or sentence are unlikely to be found solely within the narrow scope of discovery allowed by Rule 16," and that certain items which the rule expressly protects may be essential to the claimant. (Appendix A, *infra* at A9). If indeed, that is the reason for disallowing discovery under Rule 16, then it seems the fact that a long time has elapsed since the trial should be an impetus, rather than a restraint, for breaking down the barrier which affords the government the protections of Rule 16. For when a long time has elapsed after a trial, the government should have no legitimate interest to protect in turning over to a postconviction claimant those items which would prove his allegations of government misconduct sufficient to affect the validity of his conviction.

As such, in actuality, the discretion permitted a district court under the balancing approach adopted by the decision below may be utilized to deny a postconviction claimant, whose claim is facially meritorious, any opportunity to be heard. Thus, it is crucial insofar as due process is concerned that some guidelines be established setting forth the minimum amount of evidentiary

hearing, discovery, or other alternative procedure that will be permitted before a court summarily dismisses the claim. The question, therefore, of whether, as in the instant case, a district court may summarily dismiss a postconviction claim which is neither fatuous nor groundless, without providing some opportunity for presentation of the claim, has important due process ramifications, which should be answered by this Court. The case at bar presents a singular opportunity for this Court to establish those due process guidelines over the administration of postconviction proceedings.

Additionally, there is the question of whether all relief, even discovery, may be denied a postconviction claimant, who learns after conviction that the government has concealed from him its unlawful surreptitious intrusion into his conversations with his counsel. This issue boils down to the question of whether prejudice to the claimant from the concealed surreptitious intrusion into his attorney-client relationship need first be shown before the claimant is entitled to discovery.

Until the decision of *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), it was believed that *Black* v. *United States*, 385 U.S. 26 (1966) and *O'Brien* v. *United States*, 386 U.S. 345 (1967) held that prejudice need not be shown. Those cases inferred that a conviction should be automatically set aside when the government in its nefarious conduct conceals, until after conviction, a surreptitious intrusion into the conversations of a defendant and his attorney, regardless of the relevance to the conviction of what was overheard. Certainly, this is the interpretation placed upon those decisions by the dissenting opinions in *Black* v. *United States, supra* at 31 (dissenting opinion) and *O'Brien* v. *United States, supra* at 346-47 (dissenting opinion), as well as by Mr. Justice Marshall (then Solicitor General), and by Mr. Justice Brennan, who participated in the *Black* and *O'Brien* decisions. *See Weatherford* v. *Bursey, supra* at 566-68 (dissenting opinion). *See also Hoffa* v. *United States*, 387 U.S. 231, 233 (1967); *Hoffa* v. *United States*, 385 U.S. 293, 307 (1966). Such a

reading of *Black* and *O'Brien* is not unreasonable in view of the pronouncement in *Glasser* v. *United States*, 315 U.S. 60, 76 (1942) that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Accord, Coplon* v. *United States*, 191 F.2d 749 (D.C. Cir. 1951) *cert denied*, 342 U.S. 926 (1952); *Caldwell* v. *United States*, 205 F.2d 879 (D.C. Cir. 1953); *Via* v. *Cliff*, 470 F.2d 271, 275 (3d Cir. 1972); *United States* v. *Orman*, 417 F. Supp. 1126 (D. Colo. 1976).[17]

However, in *Weatherford* v. *Bursey, supra*, an action brought under section 1983 of the Civil Rights Act against an undercover agent who participated in meetings between a criminal defendant and his lawyer, this Court determined that the decisions of *Black* and *O'Brien* do not set forth a per se rule. 429 U.S. at 550-53. Under *Weatherford*, in order to establish a constitutional violation from intrusion into the attorney-client relationship, there must be shown either "tainted evidence . . ., communication of defense strategy to the prosecution . . ., or purposeful intrusion." 429 U.S. at 558. Additionally, the Court in *Weatherford* apparently considered intrusions by electronic means, such as those in the instant case, more violative of the sixth amendment than intrusions by an undercover agent. 429 U.S. at 554-55 n.4. The Court's decision in *Weatherford* was recently characterized as "a narrow one" in *United States* v. *Morrison*, 602 F.2d 529, 531 (3rd Cir. 1979), *petition for cert.*

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[17] Even cases requiring that prejudice first must be shown in order to grant relief from intrusions into the attorney-client relationship, nevertheless, apparently recognize that in situations, such as the instant case, involving gross government misconduct, prejudice need not be shown. *See, e.g., United States* v. *Zarzour*, 432 F.2d 1, 3, (5th Cir. 1970); *South Dakota* v. *Long*, 465 F.2d 65, 72 (8th Cir. 1972), *cert. denied sub nom. Hale* v. *South Dakota*, 409 U.S. 1130 (1973); *United States* v. *Rosner*, 485 F.2d 1213, 1226-27 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).

filed, 48 U.S.L.W. 3154 (U.S. Sept. 7, 1979) (No. 79-395). There it was held that "[*Weatherford*] is not broad enough to support the interpretation . . . that mere failure to gain evidence or tactical advantage from an intrusion bars any finding of a sixth amendment violation." 602 F.2d at 531.32.

As the matter now stands, there is much confusion as to the meaning and scope of the *Black, O'Brien,* and *Weatherford* decisions. This Court should settle the question of whether prejudice to a postconviction claimant from a concealed government electronic intrusion into his attorney-client relationship need be shown before he is at least entitled to discovery. By raising this issue, petitioner is by no means conceding that the overhearing of his conversations was not prejudicial. But, without being afforded any discovery, petitioner is unable to demonstrate the prejudice based on this record. Indeed, that is the very purpose of the requested discovery—to demonstrate prejudice. To require a showing of prejudice, before affording discovery, is certainly placing the cart before the horse.

The instant case presents the occasion for this Court to reexamine the decisions of *Black* and *O'Brien*, and determine their viability in light of *Weatherford* v. *Bursey*. If the Court is indeed retreating from *Black* and *O'Brien*, as the dissent in *Weatherford* suggested (429 U.S. at 568), this Court should clarify or overrule those decisions; if not, then the opinion below is in conflict with those decisions (*see* Reasons for Granting Writ I, *ante* at 23-26).

Such an important issue affecting the administration of criminal justice, namely the rights and opportunities to be afforded a postconviction claimant who finds a concealed unlawful government intrusion into his private conversations with his counsel, requires authoritative determination by this Court.

III.

The Case At Bar Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings As To Call For An Exercise of This Court's Power of Supervision.

This is the third time that the instant case has come before this Court. On each previous occasion, there was presented a different instance of admitted government misconduct. On the first occasion, petitioner uncovered gross and widespread illegal practices by the government in investigating his tax matters. These unlawful practices included not only an illegal search and seizure of evidence from his secretary's apartment, but also unlawful electronic eavesdropping of long duration upon the petitioner's office, his attorney's office, and his secretary's apartment. Notwithstanding such misconduct, petitioner's conviction was affirmed on the basis that the evidence obtained from the unlawful activity and introduced into petitioner's criminal trial was also gained from the independent source of two lawful mail covers. *United States* v. *Balistrieri,* 403 F.2d 472 (7th Cir. 1968), *cert. denied,* 394 U.S. 985 (1969). Despite the government being ordered by courts to turn over all overhearings of petitioner, and the government's assurances that the monitoring of petitioner's conversations from the above-mentioned surveillances was all that it had, petitioner, after his conviction, learned by coincidence, while his case was in this Court, that he had been monitored by the government another time. *Balistrieri* v. *United States,* 395 U.S. 710 (1969). This overhearing was during an unlawful electronic surveillance in Chicago. Upon remand, petitioner's conviction was reinstated and was again affirmed, this time on the ground that the newly discovered overhearing of petitioner gained from unlawful eavesdropping was too insubstantial to justify a reversal of his criminal conviction. *United States* v. *Balistrieri,* 436 F.2d 1212 (7th Cir. 1971), *cert. denied,* 402 U.S. 953 (1971).

And now, petitioner has by coincidence uncovered yet another concealed unlawful electronic surveillance of long duration, which was at a restaurant he frequented. During this surveillance, petitioner was overheard at least four times, one of which was during a conversation with his attorney.

Accordingly, the case at bar, *in toto,* is one in which petitioner has had to uncover, piece by sordid piece, the government's misdeeds. In the annals of criminal cases, the instant case presents perhaps the most vile and pervasive unlawful electronic surveillance ever maintained on a single individual. Few instances, if any, have ever occurred where the government's unlawful conduct was so disdainful and approached the level here. If all of the unlawful surveillance covering petitioner is considered together, then the government maintained practically a constant illegal vigil over him. The government here has never really tried to cleanse itself of its ignominious conduct—it never voluntarily disclosed to petitioner its unlawful eavesdropping, although ordered to do so by many federal courts.

As such, the case at bar is a most appropriate candidate for the exercise of this Court's power of supervision over the administration of justice in the federal courts. *Mesarosh* v. *United States,* 352 U.S. 1, 14 (1956); *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217, 225 (1946); *McNabb* v. *United States,* 318 U.S. 332, 341 (1943). *See also Black* v. *United States, supra* at 28-29.

A system of justice, founded upon the principles of liberty and equality, will become imperiled if courts fail to act upon gross indiscretions committed by the government. If a system of justice is to remain inviolate, pure, and strong, then this sort of pernicious conduct on the government's part cannot be tolerated; it will not suffice merely to deplore it. On the face of the present record, the government's unscrupulous conduct has reached such grave proportions as to discredit the system of justice. Against such disdainful and odious conduct, this Court should firmly exercise its supervisory powers.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 78-2512

United States of America,
Plaintiff-Appellee,

v.

Frank Peter Balistrieri,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division
No. 78-Cr-6602—J. Waldo Ackerman, *Judge.*

Argued April 25, 1979—Decided October 2, 1979

Before SWYGERT, *Circuit Judge,* MOORE, *Senior Circuit Judge,** and TONE, *Circuit Judge.*

MOORE, *Senior Circuit Judge:* This appeal presents an interesting issue of first impression in this court: On a motion in the nature of a writ of error coram nobis to vacate a judgment of conviction in a criminal case, should the district court apply the Federal Rules of Civil Procedure or the Rules of Criminal Procedure? We believe that the district court may draw from both sets of rules.

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* Honorable Leonard P. Moore, Senior Circuit Judge for the United States Court of Appeals for the Second Circuit, is sitting by designation.

Frank Peter Balistrieri appeals from the denial of his motion in the nature of a writ of error coram nobis (hereinafter referred to as a "coram nobis motion") by the order of the United States District Court for the Southern District of Illinois (Honorable J. Waldo Ackerman, District Judge), filed November 14, 1978. Balistrieri also seeks review of interlocutory orders of the district court filed December 3, 1976 (quashing Balistrieri's attempt to use discovery devices authorized by the Federal Rules of Civil Procedure, reported at 423 F. Supp. 793); and September 14, 1977 (partially granting and partially denying Balistrieri's discovery request under Rule 16, F.R.Cr.P.). We affirm the orders of the district court.

Balistrieri was convicted in 1967 of two counts of filing false and fraudulent income tax returns after a trial before a jury. He was sentenced to two concurrent two-year prison terms. This court affirmed the conviction in *United States* v. *Balistrieri*, 403 F.2d 472 (7th Cir. 1968). Balistrieri's conviction came before us a second time after he discovered an instance of illegal government electronic surveillance of him. See the description of the procedural history of the case in 436 F.2d 1212 (7th Cir. 1971).

In February of 1975, Balistrieri learned of another instance of electronic surveillance which might have affected his trial. A government affidavit in an unrelated criminal case disclosed in 1975 that the Federal Bureau of Investigation ("FBI") had maintained electronic surveillance of Walter Felix Brocca's restaurant in Milwaukee, Wisconsin from June 10 to December 30, 1964. Balistrieri reasoned that since he had frequented Brocca's restaurant during that time, it was likely that some of his conversations with other persons at the restaurant had been overhead. Balistrieri filed his coram nobis motion on January 30, 1976, alleging that this surveillance provided the government with evidence or leads to evidence used at his trial and that the failure of the government to disclose the existence of the surveillance prejudiced him at trial.

The government's response to the motion contained an affidavit by FBI Special Agenct Geir N. Magnuson, who stated that the record tapes of the surveillance had been destroyed, no transcripts had been prepared, and the only remaining records were the monitoring logs. The affidavit went on to reveal two occasions on which Balistrieri had been monitored and to declare that Balistrieri had not been monitored on any other occasion. Balistrieri came back with extensive requests for admissions (Rule 36), interrogatories (Rule 35), and production of documents (Rule 34) under the Federal Rules of Civil Procedure. He also served notice of the depositions of individuals who had been witnesses at his 1967 trial. The discovery requests sought details concerning the origin, installation, and operation of the electronic surveillance at Brocca's restaurant. The government filed a motion to quash this discovery on November 4, 1976; thus we come to the first order challenged by Balistrieri.

The district court granted the motion to quash on the ground that since a coram nobis motion is a step in the criminal case and not a separate civil action, the Rules of Civil Procedure were inapplicable to proceedings on the coram nobis motion and that Balistrieri was limited to the discovery available under the Rules of Criminal Procedure. To reach its decision the district court canvassed the cases dealing with coram nobis motions. The only case directly on point was *United States* v. *Marcello*, 202 F. Supp. 694 (E.D.La 1962), *aff'd on other grounds*, 328 F.2d 961 (5th Cir.), *cert. denied*, 377 U.S. 992 (1964), which held the discovery provisions of the Federal Rules of Civil Procedure inapplicable to a coram nobis motion. In reaching the result that both civil and criminal rules apply, it may be helpful to discuss the historical background of the motion in the nature of a writ of error coram nobis.

The ancient writ of error coram nobis was used to enable a court of first resort to correct its own errors. *Pickett's Heirs* v. *Legerwood*, 32 U.S. (7 Pet.) 144, 147 (1833); see generally the

discussion and authorities cited in 7 Moore's Federal Practice ¶60.14 (1979). The writ had its utility at common law in both civil and criminal cases. *United States* v. *Mayer*, 235 U.S. 55, 67-69 (1914). However, in 1946, Rule 60(b), F.R.Civ.P., was amended, abolishing writs of error coram nobis and other common law forms of relief from judgments.[1] Nevertheless, the ancient writ of error coram nobis rose phoenix-like from the ashes of American jurisprudence through the benign intervention of the Supreme Court in *United States* v. *Morgan*, 346 U.S. 502 (1954).

In *Morgan* the respondent was a state prisoner who had been sentenced to a longer term of imprisonment on account of a prior federal conviction. Morgan filed an application for a writ of error coram nobis and gave notice of a motion for the writ in the United States District Court where his first conviction had occurred, all in conformance with the ancient usages of the writ. The district court treated the proceeding as a motion under 28 U.S.C. §2255 (1976)[2] and refused relief because the applicant was no longer in federal custody and thus was outside the terms of §2255.

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[1]The pertinent part of Rule 60(b) reads:

"This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

[2]The first part of §2255 reads:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the

The Supreme Court held that although the writ of error coram nobis had been abolished in civil cases, it was available for review of a criminal conviction when §2255 did not apply. Authority for use of the writ was found in 28 U.S.C. §1651(a),[3] the all-writs section of the Judicial Code. Balistrieri's motion in this case derives its legitimacy directly from *United States* v. *Morgan*.

The *Morgan* Court did not specify what rules of procedure should apply to the newly revitalized motion in the nature of a writ of error coram nobis. Courts which have had to decide this question have focused on footnote 4[4] of *Morgan* where the Court said:

> "Such a motion is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding." 346 U.S. at 505 n.4.

United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

[3]Section 1651(a) reads:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[4]The full text of footnote 4 of *Morgan* reads:

"Such a motion is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding. *Kurtz* v. *Moffitt*, 115 U.S. 487, 494. While at common law the writ of error *coram nobis* was issued out of chancery like other writs, Stephens, Principles of Pleading (3d Amer. ed.), 142, the procedure by motion in the case is now the ac-

The court below based its decision on this language, as did the court in *United States* v. *Marcello, supra*. Other courts have echoed the *Morgan* language: *McDonald* v. *United States*, 356 F.2d 980 (10th Cir. 1966); *Abel* v. *Tinsley*, 338 F.2d 514 (10th Cir. 1964); *Peterson* v. *State of Missouri*, 355 F. Supp. 1371 (W.D.Mo. 1973). None of these other courts, however, had to decide which rules of procedure to apply.

The leading case in which a court had to decide whether to apply a civil rule or a criminal rule is *United States* v. *Keogh*, 391 F.2d 138 (2d Cir. 1968).[5] There the appellant had filed his notice of appeal twenty-seven days after his petition for a writ of error coram nobis had been denied. F.R.Civ.P. 73(a) allowed 60 days to file a notice of appeal and F.R.Cr.P 37(a)(2) allowed only 10 days. The government argued that the criminal rule was applicable on the basis of footnote 4 of *United States* v. *Morgan, supra*. Judge Friendly dispatched this argument by noting that *Morgan's* footnote 4 was designed only to preserve coram nobis relief in a criminal case from the Rule 60(b) abolition of coram nobis writs in "suits of a civil nature", to which Rule 60 applied by virture of F.R.Civ.P. 1. 391 F.2d at 140. In fact, as Judge Friendly pointed out, the *Morgan* footnote goes on to say that the coram nobis motion "is of the same general character as one under 28 U.S.C. §2255". Taking our cue from the *Morgan* footnote, we now consider the similarity between a coram nobis motion and a motion under §2255.

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cepted American practice. *Pickett's Heirs* v. *Legerwood*, 7 Pet. 144, 147; *Wetmore* v. *Karrick*, 205 U.S. 141, 151; *United States* v. *Mayer*, 235 U.S. 55, 67. As it is such a step, we do not think that Rule 60(b), Fed. Rules Civ. Proc., expressly abolishing the writ of error *coram nobis* in civil cases, applies. This motion is of the same general character as one under 28 U.S.C. §2255. See Reviser's Note. *Cf. United States* v. *Kerschman*, 201 F.2d 682, 684. And see contra to the above note, *People* v. *Kemnetz*, 296 Ill. App. 119, 15 N.E.2d 883."

[5]But see *United States* v. *Mills*, 430 F.2d 526 (8th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971).

Since the legislative history of §2255 is well detailed in *United States* v. *Hayman*, 342 U.S. 205, 214-23 (1951), we will present only the major points here. Section 2255 was written to solve procedural problems which arose from a growing number of habeas corpus suits by federal prisoners. One of these problems was the difficulty of obtaining the testimony of witnesses in the district where a federal prisoner was confined, as is necessary in a habeas corpus action. Therefore, the judicial conference drafted a provision which allowed a federal prisoner to move to vacate, set aside, or correct the sentence in the courts which had imposed the sentences, where witnesses with knowledge of the trial were more likely to be available. The device of a motion in the sentencing court was of the same general nature as a writ of error coram nobis because it allowed the sentencing court to correct its own errors. *See* Judicial Conference Statement quoted in *United States* v. *Hayman, supra*, 342 U.S. at 216-17.

Section 2255 was passed in 1948, accompanied by a Reviser's Note quoted in part here:

> "This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis. It provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus." 28 U.S.C. §2255.

The *Morgan* decision recognized the similarity between §2255 and coram nobis as expressed in the Reviser's Note and, in effect, made a coram nobis motion an extension of §2255 in cases where the applicant was no longer a federal prisoner. This close relationship has also been accepted in *Neely* v. *United States*, 546 F.2d 1059 (3d Cir. 1976) (applying the civil class action rules to a proceeding similar to a coram nobis motion), and *United States* v. *Tyler*, 413 F.Supp. 1403 (N.D.Fla. 1976).

Section 2255 has authoritatively been characterized as "an independent civil suit". *Heflin* v. *United States*, 358 U.S. 415, 418 n.7 (1959). Thus, to the extent a coram nobis motion is like a

§2255 motion, the former is also civil in nature. It is apparent, then, that a coram nobis motion is a step in a criminal proceeding yet is, at the same time, civil in nature and subject to the civil rules of procedure. Judge Scott well stated this point most clearly in *United States* v. *Tyler, supra*:

> "Coram nobis is, then, a hybrid action: quasi-civil and quasi-criminal. It is a remedy available in a criminal case to correct fundamental errors that render that proceeding irregular and its judgment invalid. Nevertheless, because it is a postjudgment attack upon a conviction by a defendant no longer in any form of custody, and insofar as it is still governed by civil rules, forms and pleadings, its character reflects the vestiges of its civil origins: the intrinsic all-writs jurisdiction of the Court." 413 F.Supp. at 1404-05 (citations omitted).

On February 1, 1977, new rules governing §2255 proceedings became effective for all United States District Courts. 28 U.S.C. §2255 (1976). Inasmuch as we have already remarked on the similarity between §2255 and coram nobis, we deem these rules to be highly persuasive in deciding how coram nobis motions should be conducted, especially since the rules were proposed by the Supreme Court and approved by Congress. Rule 6 of the §2255 rules states in part:

> "A party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise."

The Advisory Committee Note to Rule 6 reveals that use of both sets of rules is authorized because "of the nature of a §2255 motion as a continuing part of the criminal proceeding . . . as well as a remedy analogous to habeas corpus by state prisoners". This view not only strengthens the similarity of §2255 and coram nobis but also reaffirms our view that a coram nobis motion partakes of the nature of both a criminal and civil proceeding. It is within the district court's discretion to apply the appropriate rules on the basis of the facts of each case.

We conclude that the court was acting well within its discretion in limiting the scope of discovery to be afforded to Balistrieri. Rule 26(c), F.R.Civ.P., permits a party from whom discovery is sought to move for a protective order and authorizes the district court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense . . . " The protective order may limit the scope or manner of discovery or limit the number of persons who see the discovered material. Coram nobis motions, insofar as they are sometimes made long after the judgment of conviction was rendered, are peculiarly appropriate candidates for use of the district court's discretion under Rule 26(c). The district court's decision to quash Balistrieri's discovery requests was within its discretion under the rule, especially in light of the breadth of the discovery requests in relation to the rather narrow ground of illegal surveillance upon which the coram nobis motion was based.

Rule 16, F.R.Cr.P., is an unsatisfactory vehicle for discovery requests in proceedings on a coram nobis motion. Facts which affect the validity of the conviction or sentence are unlikely to be found solely within the narrow scope of discovery allowed by Rule 16. On a coram nobis motion, statements made by government witnesses or prospective witnesses, expressly protected from discovery by Rule 16(a)(2), may be highly relevant to the applicant's ability to prove his allegations. For reasons of policy, as well as the consistency of legal concepts, it is necessary to grant applicants the scope of discovery under civil rules and, at the same time, assure the government and others of due protection from burdens arising from participation in old criminal proceedings. The district court should consider the amount of time which has elapsed since the trial, the burden of

discovery on the government and witnesses, and the nature of the applicant's claims in deciding on the scope of discovery at each stage of the coram nobis proceedings. If relevant evidence is revealed by discovery which only lightly burdens the government, the court retains the option of allowing more extensive requests in order to see if there is more evidence to be found. However, if examination of only the most relevant materials fails to turn over any relevant new stones, the coram nobis proceedings may be brought to a speedy conclusion.

This case fits the latter category. Judge Ackerman did allow Balistrieri to obtain *in camera* production of the monitoring logs for the surveillance at Brocca's restaurant, the only evidence of the surveillance which remained. The court's *in camera* inspection revealed only two occasions, not previously disclosed to Balistrieri, when his conversations at the restaurant had been overheard. Because, as we will explain below, none of these instances of surveillance could possibly have affected Balistrieri's convictions for income tax evasion, the district court quite properly decided to end the discovery process in its order of September 4, 1977. Hence, that order is affirmed.

With respect to the merits of the coram nobis motion, Balistrieri's contentions focused on the fact that the FBI had secretly intruded upon a conversation with his attorney Dominic Frinzi on one occasion at Brocca's restaurant. The restaurant discussion occurred more than two years prior to Balistrieri's trial for tax evasion and involved the attorney who defended him in that trial. Balistrieri's argument is that this illegal intrusion denied him the effective assistance of counsel.

Although illegal electronic eavesdropping by the government on attorney-client conversations may be a violation of a defendant's Sixth Amendment rights, and therefore, grounds for a new trial in some cases, *Coplon* v. *United States*, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952), the facts of this case do not warrant such treatment. The surveillance at

Brocca's restaurant was not directed at Balistrieri. The persons who conducted the investigation of Balistrieri's tax affairs did not know about the surveillance because the FBI did not widely disclose their operations. The monitored conversations had nothing to do with Balistrieri's tax affairs or any legal matter affecting him. A third person was present. Even if the attorney-client privilege attached to this conversation, a dubious proposition in itself, the intrusion into the conversation cannot be deemed to have denied Balistrieri the effective assistance of counsel at his criminal trial. Balistrieri was not prejudiced and we find no reason to set aside his conviction.

A claim of perjury by the government's witnesses has not been pressed on appeal. We merely note our agreement with the district court's conclusion that Balistrieri's allegations were merely speculative and warranted no further investigation.

We affirm denial of the motion in the nature of a writ of error coram nobis and denial of appellant's discovery requests.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

December 6, 1979.

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. LEONARD P. MOORE, Senior Circuit Judge*

Hon. PHILIP W. TONE, Circuit Judge

United States of America,
Plaintiff-Appellee,

No. 78-2512 vs.

Frank Peter Balistrieri,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois Southern Division

No. 78-CR-6602

J. Waldo Ackerman,
Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by defendant-appellant, no judge in active service has requested a vote thereon,** and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*The Honorable Leonard P. Moore, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, is sitting by designation.

**The Honorable Harlington Wood, Jr. did not participate in any consideration of the petition for rehearing in banc.

APPENDIX C

In The United States District Court

Southern District of Illinois—Southern Division

United States of America,

Plaintiff,

v. Criminal No. 6602

Frank Peter Balistrieri,

Defendant.

ORDER
(Filed December 3, 1976)

Defendant Balistrieri having been convicted of income tax evasion in 1967, and having fully served his sentence, now presents a motion in the nature of a writ of error coram nobis seeking to overturn the jury verdict and subsequent judgment of conviction entered by this Court. Pursuant to the motion, defendant seeks to discover from the Government certain information utilizing the Federal Rules of Civil Procedure. The devices employed by defendant include a request for admissions pursuant to F.R.Civ.P. 36, a request for production of documents under F.R.Civ.P. 34 and interrogatories pursuant to F.R.Civ.P. 35. The Government now moves to quash this discovery. The question presented then, is whether civil discovery devices mandated under the Federal Rules of Civil Procedure are available to a defendant when he presents a motion in the nature of a writ of error coram nobis.

Writs of error coram nobis were abolished by Federal Rule of Civil Procedure 60(b). But this provision has been held to abolish the writ in civil cases while the right to pursue such a remedy by motion in a criminal case has been held preserved

under the All Writs Statute, 28 U.S.C. §1651. *United States* v. *Morgan*, 346 U.S. 502 (1954). Footnote 4 to the *Morgan* case is relevant to our inquiry here and states that:

> Such a motion is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding. *Kurtz* v. *Moffitt*, 115 U.S. 487, 494, 6 S.Ct. 148, 149, 29 L.Ed. 458. While at common law the writ of error coram nobis was issued out of chancery like other writs, Stephens, *Principles of Pleading*, 3d Amer. ed., 142, the procedure by motion in the case is now the accepted American practice. *Pickett's Heirs* v. *Legerwood*, 7 Pet. 144, 147, 8 L.Ed. 638; *Wetmore* v. *Karrick*, 205 U.S. 141, 151 27 S.Ct. 434, 436, 51 L.Ed. 745; *United States* v. *Mayer*, 235 U.S. 55, 67, 35 S.Ct. 16, 18, 59 L.Ed. 129. As it is such a step, we do not think that Rule 60(b), Fed. Rules Civ. Proc., 28 U.S.C.A., expressly abolishing the writ of error coram nobis in civil cases, applies. This motion is of the same general character as one under 28 U.S.C. §2255, 28 U.S.C.A. §2255. See Reviser's Note. Cf. *United States* v. *Kerschman*, 7 Cir., 201 F.2d 682, 684. And see contra to the above note, *People* v. *Kemnetz*, 296 Ill. App. 119, 15 N.E. 2d 883.

The Government argues that since "such a motion is a step in the criminal case and not . . . the beginning of a separate civil proceeding . . ." the civil discovery rules are not available and thus defendant's discovery must be quashed. As direct authority the Government cites *United States* v. *Marcello*, 202 F. Supp. 694 (E.D.La. 1962). In that case the Court held a motion in the nature of a writ of error coram nobis ". . . is a step in a criminal proceeding. Since Rule 60(b) of the Federal Rules of Civil Procedure expressly abolishes writs of coram nobis in civil proceedings, discovery thereunder is not authorized here." *United States* v. *Marcello*, 202 F.Supp. 694, 696 (E.D.La. 1962). Other cases hold that a motion in the nature of a writ of error coram nobis to be "a step in the criminal case" but do not

discuss the applicable rules of procedure. *Peterson* v. *State of Missouri*, 355 F.Supp. 1371 (W.D.Mo. 1973); *McDonald* v. *United States*, 356 F.2d 980 (10th Cir. 1966); *Able* v. *Tinsley*, 338 F.2d 510 (10th Cir. 1964).

Defendant contends that although a motion in the nature of a writ of error coram nobis is "a step in the criminal case", it is a civil proceeding. As authority defendant also cites a portion of footnote 4 in the *Morgan* case, 346, which says "that [t]his motion is of the same general character as one under 28 U.S.C. §2255." Section 2255 is clearly not a step in a criminal prosecution. Rather, "[i]t is civil in nature and is governed by the rules and statutes applicable to civil action." *Brown* v. *United States*, 480 F.2d 1036, 1039 (5th Cir. 1973). Thus defendant argues that footnote 4 could be read as implying that the motion is civil in nature and that the rules of civil procedure apply. Cases holding a motion in the nature of a writ of error coram nobis to be civil in nature include *Burns* v. *State of Alabama*, 377 F.2d 233 (5th Cir. 1967), and *Jones* v. *Squier*, 195 F.2d 179 (9th Cir. 1967).

Defendant also places great weight on *United States* v. *Keogh*, 391 F.2d 138 (2nd Cir. 1968). In that case, in order for the case to be properly before the Second Circuit Court of Appeals, Judge Friendly applied the 60 day time for appeal provision of Federal Rule of Civil Procedure 73(a) rather than the 10 day time limit of F.R.Cr.P. 37(a)(2). Although Judge Friendly rejected the interpretation the Government here seeks to put on footnote 4 of the *Morgan* decision he expressed no opinion on the general applicability of the Federal Rules of Civil Procedure to a motion in the nature of a writ of error coram nobis.

I believe the Government has the best of the argument. Only the *Marcello* case is directly on point and the result reached there is the proper one. A motion in the nature of a writ of error coram nobis is but a step in the criminal case. Subjecting the Government to costly and time consuming inquiries into matters long closed through the broad latitudes of civil discovery is not justified.

This case has been pending in one guise or another since the indictment in January of 1965, almost seventeen years. At some point the litigation must terminate. The common law writ of coram nobis sought to have a judgment revoked for errors of fact outside the record. Justice demands such a procedure. Justice does not demand however that civil discovery methods by employed to allow a defendant to fish for facts that may or may not exist and may or may not justify the motion in the first instance.

Government's motion to quash defendant's discovery is granted.

Enter this 3rd day of December, 1976.

/s/J. Waldo Ackerman
United States District Judge

APPENDIX D

In The United States District Court

Southern District of Illinois—Southern Division

United States of America,

Plaintiff,

v. Criminal No. 6602

Frank Peter Balistrieri,

Defendant

ORDER

(Filed September 14, 1977)

This Court previously has taken certain monitoring logs of conversations overheard of various individuals by electronic surveillance at Walter F. Brocca Restaurant, 519 West Well St., Milwaukee, Wisconsin, between June 10, 1964, and December 30, 1964. (I note that the brief of the Government filed February 7, 1977, indicates that the electronic surveillance continued until February 5, 1965; however, the logs of dates between December 30, 1964, and February 5, 1965, have not been submitted. Subsequent affidavits, however, show that December 30, 1964, was the last date of the electronic surveillance.)

F.R.Cr.Pr. 16 provides that the Government must disclose all records of illegal electronic surveillance to which defendant has standing to demand. The United States Supreme Court, however, in *Alderman* v. *U.S.*, 394 U.S. 165, defined those with standing as those whose 4th Amendment rights have been violated. In other words, "disclosure will be limited to defendant's own conversations and those which took place on his premises".

As indicated herein, I have examined the logs above described and have found only two conversations which are identified as being those of Frank Peter Balistrieri and they are as follows: (Note: the conversations are not identified as being that of Frank Peter Balistrieri but rather "Frank B." but I am assuming that this is, in fact, Frank Balistrieri.).

> 7-25-64 at 12:42 a.m. - "Music starts. Discussion on current political situation. Man #1 is Dominic Frenzi—heard to say that Republican Party can't afford to do—Dominic orders three cups of coffee. Jenny called out she wanted coke. Man #2 is Frank B. He can't be understood at all—talks too low at this point. Frenzi continues talking. Mentions Republican Party all the time and cussed Goldwater especially in regard to CR and platform. Joking and laughing. Conversation not audible. Frenzi made a crack about the Sheriff of Milwaukee County followed by more laughter. Not audible. Conversation about the DA in Kenosha in joking manner followed by more laughter. Other customers coming and going. Cash register ringing. Frenzi wants to go home and get some sleep. Frank B. heard to say something, but not audible. Somebody wants to buy some drinks on way out—cash register rings, good nights are exchanged, at 1:08 a.m., Restaurant becomes quiet but placed on record."

On 8-6-64, at 8:27 p.m., the following:

> "Two men enter—one is Blackie. Directs other to where the cold water is. Blackie went to cash register—apparently got some change out, as thereafter jukebox started up blocking all conversation. By tone of companion's voice, possibly Frank B. Radio turned on to a ball game also."

This memorandum order furnishes to defendant the material to which he is entitled. Therefore the motion of defendant for discovery of the entire material is denied. The logs however will be sealed to be opened only upon court order and placed on file in the Clerk's office in order to facilitate any subsequent appeal.

Enter this 14th day of September, 1977.

/s/ J. Waldo Ackerman
United States District Judge

APPENDIX E

In The United States District Court

Southern District Of Illinois—Southern Division

United States of America

v. Cr. 6602

Frank Peter Balistrieri,

Defendant.

ORDER
(Filed November 14, 1978)

Before this Court is defendant's motion in the nature of a writ of error *coram nobis* filed pursuant to 28 U.S.C. §1651(a). This motion seeks to collaterally attack a criminal income tax evasion conviction entered as a judgment of this Court on September 18, 1967. In support of his motion, the defendant alleges a pattern of unlawful intrusions and electronic surveillances which are allegedly coupled with governmental deception and failure to disclose material information. Additionally, defendant alleges that his conviction is tainted by the perjured testimony of two witnesses. The defendant requests an evidentiary hearing to prove these allegations and ultimately asks that this Court vacate and set aside his conviction.

The law is clear that courts have a solemn duty in *coram nobis* proceedings to search the defendant's allegations for symptoms of fundamental infirmities, and that an evidentiary hearing should be denied only where the record shows that the defendant is entitled to no relief. *United States* v. *Strother*, 434 F.2d 1292, 1294 (5th Cir. 1970); *United States* v. *Liska*, 409 F.Supp. 1405, 1406 (D.C. Wis. 1976). *Accord*, *Farbo* v. *United States*, 452 F.2d 132, 133 (7th Cir. 1971). It is equally clear, however,

that a writ of error *coram nobis* is an extraordinary remedy to be allowed "only under circumstances compelling such action to achieve justice." *United States* v. *Morgan*, 346 U.S. 502, 511 (1954).

First, as to the alleged perjury, the defendant has failed to allege sufficient facts to warrant an evidentiary hearing. *Accord*, *Short* v. *United States*, 504 F.2d 63, 65 (6th Cir. 1974); *Torres* v. *United States*, 469 F.2d 651, 652 (9th Cir. 1972). The defendant's claims are stated in the form of conclusions without any allegations of facts or indication of what proof would be offered in support thereof. This is true even though the defendant has specifically cited what he alleges to be the perjured testimony, because he has not included any reference as to the basis of his belief that the testimony was false.

Concerning the unlawful surveillance and deception allegations, I believe the defendant is seeking to relitigate issues which have already been adjudicated by this Court and many of which have been reviewed by the United States Court of Appeals for the Seventh Circuit and the United States Supreme Court. *See Balistrieri* v. *United States*, 395 U.S. 710 (1969); *United States* v. *Balistrieri*, 436 F.2d 1212 (7th Cir. 1971), 403 F.2d 472 (7th Cir. 1968). The law is clear that it is proper to deny a post-conviction evidentiary hearing when the grounds alleged as a basis for relief have been previously raised and decided against the movant. *DeWelles* v. *United States*, 372 F.2d 67 (7th Cir.) cert. denied, 388 U.S. 919 (1967). *See also, Juelich* v. *United States*, 475 F.2d 788 (5th Cir. 1973); *Thornton* v. *United States*, 368 F.2d 822 (D.C.Cir. 1966).

The defendant places undue emphasis upon the "new" evidence regarding the government's surveillance at Walter Felix Brocca's Restaurant. As indicated in my Order entered September 14, 1977, I have examined the logs of the restaurant surveillance and I do not believe the defendant was the object of the surveillance, or that the logs include any material requiring

an evidentiary hearing. Rather, the recorded conversations involving the defendant are clearly innocuous as evidenced by the text quoted in my Order of September 14, 1977.

I cannot accept the defendant's contention that the disclosed conversation between the defendant and Mr. Dominic Frenzi, the defendant's attorney, changes this result. The *Black* v. *United States*, 385 U.S. 26 (1966), line of cases relied upon by the defendant does not stand for the broad assertion that concealment of *any* communication between the defendant and his attorney, not disclosed until after the trial, requires the requested evidentiary hearing or granting of the motion. The defendant contends this *per se* rule is necessary in order not only to insure justice, but also to preserve the appearance of justice. I cannot agree. Those cases concern situations where the disclosed conversations related to the attorney's representation or where the communication's content was unknown. Here, it is clear that the conversation is merely social in nature and does not invade the protected attorney-client privilege. Thus, there has been no infringement of the defendant's right to counsel or deprivation of his right to an adversary proceeding. Having again considered the logs, I am convinced an evidentiary hearing would serve no useful purpose.

The defendant finally submits that even though this Court perceives the motion to be an attempt to relitigate points previously decided, "the ends of justice would be served by a redetermination of these grounds." *See Sanders* v. *United States*, 373 U.S. 1, 15-17 (1963). I cannot agree. The defendant has received a full hearing on all material issues presented by this motion and is not now entitled to relitigate them.

Accordingly, defendant's motion in the nature of a writ of error *coram nobis* is denied without an evidentiary hearing.

Enter this 10th day of November, 1978.

/s/J. Walso Ackerman
United States District Judge